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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER DUGGAN, individually, and on behalf of other members of the general public similarly situated, and as aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"),

Plaintiff,

v.

TACO BELL CORP., a California corporation; TACO BELL OF AMERICA, INC. a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants

Case No. CV 11 5806 (MEJ)

DEFENDANTS TACO BELL CORP. AND TACO BELL OF AMERICA, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT F.R.C.P. 12(B)(3), OR IN THE ALTERNATIVE, TO STAY OR TRANSFER PURSUANT TO THE "FIRST TO FILE" RULE OR ALTERNATIVELY, TO TRANSFER VENUE PURSUANT TO 28 U.S.C. 1404(A)

[Filed concurrently with Defendants' Request for Judicial Notice and Proposed Order]

Date: January 19, 2012
Time: 10:00 a.m.
Place: San Francisco Courthouse, Courtroom B - 15th Floor 450 Golden Gate Avenue, San Francisco, CA 94102

[Complaint Filed: Sept. 21, 2011]

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. Rule 12(b)(3) and 28 U.S.C. § 1404(a), on January 19, 2012 at 10:00 a.m. or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Maria-Elena James, United States District Court for the Northern District of California, located at 450 Golden Gate Ave, San Francisco, California, 95102, defendants Taco Bell Corp. and Taco Bell of America, Inc. (collectively "Defendants" or "Taco Bell") will and hereby do move the Court to dismiss, or in the alternative to stay or transfer, the action brought against it by named plaintiff Christopher Duggan ("Duggan"). This motion is brought on the grounds that a prior action involving the same issues, the same named parties, and overlapping putative class members was filed first and is currently pending in the Eastern District of California. No good cause exists not to follow the "first to file" rule and this action should be dismissed, or in the alternative stayed or transferred. The motion is based on this Notice and the accompanying Memorandum of Points and Authorities, Defendants' Request for Judicial Notice, and supporting exhibits thereto, any reply papers as may be filed, the pleadings and records on file in this action, the argument of counsel at the hearing; and other such matters as may be judicially noticed or come before the Court at the hearing on this matter.

STATEMENT OF RELIEF SOUGHT

1. That this Court employ the first-to-file rule and dismiss, or in the alternative stay or transfer, the instant matter on the grounds that a prior action involving the same issues, the same named parties, and overlapping putative class members was filed first and is pending in the U.S.D.C. for the Eastern District of California.

2. Alternatively, Defendants seek to transfer venue to the Eastern District pursuant to the Court's broad discretionary power to transfer cases between districts in the interest of justice under 28 U.S.C. section 1404(a)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In filing this action, Plaintiff Christopher Duggan ("Duggan") and his counsel, Initiative Legal Group, are blatantly forum shopping and ignoring the well established "first to file" doctrine, despite their explicit knowledge of, and involvement in, the ongoing and duplicative action, In re Taco Bell, currently pending in the Eastern District. In this action, Duggan and his counsel, on behalf of a putative class, allege the same harm, seek to adjudicate the same issues and ask for the same remedies that allegedly arise out of the same nucleus of facts as they are currently litigating in the In re Taco Bell action. In fact, Duggan is not only a member of the In re Taco Bell class, but is a *named plaintiff and purported class representative*. To confound things further, Initiative Legal Group, Duggan's counsel here, is the *interim lead class counsel* in the In re Taco Bell action.

Duggan and his counsel intentionally seek to subject Defendants to the prospect of defending the same case in different district courts, obviously with the clear intent to seek a "better forum" for themselves. Such knowing conduct is an abuse of the judicial process, a waste of judicial time and resources, and is precisely why the Ninth Circuit adopted the "first-to-file" doctrine.

The "first-to-file" doctrine is applied by courts to avoid duplicative lawsuits. It permits a district court to dismiss, stay, or transfer a second-filed lawsuit in deference to the court presiding over the first-filed action. The rule promotes consistent application of rulings made by district courts and serves the policies of comity and judicial efficiency. In addition, it avoids the potential for conflicting decisions. It has long been the policy of federal courts to adhere to the "first-to-file" rule in absence of extraordinary circumstances.

Here, the absence of "extraordinary circumstances" is clear. In re Taco Bell was filed first. The parties are the same (Taco Bell Corp. and Taco Bell of America, Inc. are the defendants and Duggan is a named plaintiff in both cases). Moreover,

the central dispute in both matters, whether non-exempt employees were properly paid wages and reimbursed for expenses as required by California law, is identical. There is no question that the "first-to-file" rule applies to this case and there are no extraordinary circumstances. As such, the Court should dismiss, or in the alternative, stay the action or transfer the action to the Eastern District.

Alternatively, Defendants seek to transfer venue to the Eastern District pursuant to the Court's broad discretionary power to transfer cases between districts in the interest of justice under 28 U.S.C. section 1404(a). This action could have been brought in the Eastern District and should be transferred to that district because it already is handling the In re Taco Bell case, and there is no reason why this Court should be required to reinvent the wheel by starting with this case from scratch. Thus, if not dismissed or stayed, this action should be transferred to the Eastern District for coordination with In re Taco Bell.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Duggan's Employment with Taco Bell

Plaintiff Christopher Duggan initially worked for Defendants as a non-exempt hourly employee from October 2007 to August 2008. (Request for Judicial Notice, ¶ 1, Ex. 1, ¶ 41 at 12:9-11.) Duggan renewed his employment with Defendants as a non-exempt hourly employee, in April 2009. (RJN, ¶ 2, Ex. 2, ¶ 24.)

B. Duggan's First Lawsuit Against Taco Bell

On November 29, 2010, former employee Teresa Nave filed a putative class action lawsuit against Taco Bell of America, Inc. and Taco Bell Corp. (RJN, Ex. 3.) The lawsuit, entitled Nave v. Taco Bell of America, Inc., et al. Eastern District Case No. 10-CV-02222-OWW-DLB (the "Nave Class Action"), alleges that Taco Bell violated a number of California state wage and hour laws. (Id.) In that complaint, Ms. Nave seeks to represent a putative class consisting of current and former non-exempt hourly Taco Bell employees who worked for Taco Bell in California. Specially, Ms. Nave alleges that Taco Bell failed to pay her, and putative class

members, all accrued and unused vacation pay at separation, and failed to provide them with rest periods in accordance with California law. (Id.) Ms. Nave further alleges that she and putative class members are owed statutory "waiting time" penalties for failure to pay all wages due at separation of employment and she seeks restitution of all funds allegedly withheld under California Business and Professions Code sections 17200, et seq. (Id.)

On November 29, 2010, Ms. Nave filed a Notice of Related Case, in which she related the Nave Class Action to the putative class action lawsuit In re Taco Bell Wage and Hour Actions ("In re Taco Bell") pending in the Eastern District of California, Case No. CV-F-07-1314 OWW-DLB. (RJN, ¶ 4, Ex. 4.) Ms. Nave represented to the Court that the Nave Class Action is related to In re Taco Bell because it involves the same defendants (Taco Bell Corp. and Taco Bell of America, Inc.), it arises from the same or substantially similar transactions, occurrences and events, or involves similar or identical claims, and calls for a determination of the same or substantially similar questions of law and fact. (RJN, Ex. 4, 2:1-11.)

On December 9, 2010, Ms. Nave filed a First Amended Complaint, adding current Taco Bell employee Christopher Duggan, the named plaintiff in the instant action, as a named plaintiff in the Nave Class Action. (RJN, Ex. 3.) The original Complaint was not otherwise amended and the causes of action remained the same.

On December 14, 2010, pursuant to a stipulation of the parties, the Eastern District entered an order consolidating the Nave Class Action with In re Taco Bell, pursuant to the Court's June 9, 2009, Pretrial Order Regarding Consolidation of Pending Actions and Appointment of Initiative Legal Group LLP As Interim Lead Counsel. (RJN, Ex. 4 - May 19, 2009 Memorandum of Decision and Order Granting Defendants' Motion for Consolidation.) Initiative Legal Group LLP, interim lead counsel in the In re Taco Bell matter, is Duggan's counsel in the instant case.

On May 17, 2011, Initiative Legal Group filed the First Amended

Consolidated Complaint in the In re Taco Bell action. As set forth in that FAC, Duggan, and other named plaintiffs, seek individual and class-wide relief for the following alleged violations, which include, but are not limited to:

- Violation of Labor Code § 1194 (Unpaid Minimum Wages) for "All non-exempt hourly-paid employees of [DEFENDANTS . . .] from September 7, 2003 until the resolution of this lawsuit;"
- Violation of California Labor Code §§ 2800 and 2802 (Unreimbursed Business Expenses, including but not limited to "costs of required shoes") for "All non-exempt hourly-paid employees of [DEFENDANTS . . .] who incurred business-related expenses and costs [including but not limited to "costs of required shoes"] that were not reimbursed from September 7, 2003 until the resolution of this lawsuit;"
- Violation of California Labor Code §§ 201 and 202 (Non-Payment of Wages Upon Termination) for "All non-exempt hourly-paid employees of [DEFENDANTS . . .] who were not timely tendered their wages upon termination of employment from September 7, 2004 until the resolution of this lawsuit;" and,
- Violation of California Business and Professions Code §§ 17200, et seq. seeking "restitution of the wages withheld and retained by Defendants during a period that commences on September 7, 2003" and which extends until the resolution of the lawsuit.

(RJN, Ex. 1.)

C. Duggan's Second Lawsuit Against Taco Bell – This Instant Action – Duggan Class Action

On September 21, 2011, nine months after his first lawsuit was consolidated with In re Taco Bell, Initiative Legal Group filed a putative class action complaint against Taco Bell Corp. and Taco Bell of America, Inc. in the San Francisco County Superior Court on his behalf ("Duggan Class Action"). (RJN, Ex. 2.)

In the Duggan Class Action, Duggan seeks to represent a putative class consisting of current and former non-exempt hourly Taco Bell employees who worked for Taco Bell in California since September 21, 2007. Moreover, as demonstrated in the chart below, the Duggan Class Action, alleges substantially similar, indeed nearly identical, causes of action as that alleged in In re Taco Bell:

	In re Taco Bell	**Duggan v. Taco Bell**
Plaintiff(s)	Christopher Duggan et al	Christopher Duggan
Identical Counsel	Initiative Legal Group APC, interim lead class counsel	Initiative Legal Group APC
Claims	Violation of Labor Code § 1194 (Unpaid Minimum Wages) from September 7, 2003 until the resolution of the lawsuit;	Violation of Labor Code § 1194 (Unpaid Minimum Wages) from September 21, 2007 until the resolution of the lawsuit;
	Violation of California Labor Code §§ 2800 and 2802 (Unreimbursed Business Expenses, including but not limited to "costs of required shoes") from September 7, 2003 until the resolution of the lawsuit;	Violation of California Labor Code §§ 221 and 224 (Unlawful deductions for required shoes) from September 21, 2007 until the resolution of the lawsuit;
	Violation of California Labor Code §§ 201 and 202 (Non-Payment of Wages Upon Termination) from September 7, 2004 until the resolution of this lawsuit; and,	Violation of California Labor Code §§ 201 and 202 (Non-Payment of Wages Upon Termination) from September 21, 2007 until the resolution of the lawsuit; and,
	Violation of California Business and Professions Code §§ 17200,	Violation of California Business and Professions Code §§ 17200,

	et seq. seeking "restitution of the wages withheld and retained by Defendants" during a period that commences on September 7, 2003 and which extends until the resolution of the lawsuit.	et seq. seeking "restitution of the wages withheld and retained by Defendants" during a period that commences on September 21, 2007 and which extends until the resolution of the lawsuit.

(*Cf.* RJN, Exs. 1 and 2.)

On December 2, 2011, Defendants removed the Duggan Class Action to this Court. (RJN, Ex. 6.)

III. THE COURT SHOULD DISMISS, STAY, OR TRANSFER THIS CASE TO THE EASTERN DISTRICT IN DEFERENCE TO *IN RE TACO BELL*

A. This Court Should Apply The "First-To-File" Rule Because The Eastern District In *In Re Taco Bell* Is Already Adjudicating Substantially Similar Issues As Those Presented In This Action

When cases involving the same parties and issues have been filed in two different courts, the first-to-file rule grants the second court the discretion to decline jurisdiction over the second case in the interest of efficiency and judicial economy. Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F. 2d 93, 94-95 (9th Cir. 1982). The rule "promotes judicial efficiency and prevents the risk of inconsistent decisions that would arise from multiple litigations of identical claims." Meru Networks v. Extricom Ltd., No. C-10-02021 RMW, 2010 WL 3464315, (N.D. Cal. Aug. 31, 2010) See, also, Sasco v. Byers, No. 08-5641 JF (RS), 2009 U.S. Dist. LEXIS 36886, *13 (N.D. Cal. Apr. 14, 2009) (granting defendant's motion to dismiss under the first-to-file rule because claims substantially overlapped with counterclaims in a first-filed action) (citations omitted). The first-to-file rule "serves the purpose of promoting efficiency well and should not be disregarded lightly." See Pacesetter, 678 F.2d at 95 (holding that district court's decision to apply the first-to-file rule was

only reviewable for an abuse of discretion). "Restraint of the first-filed suit is made only to prevent wrong or injustice." Kahn v. General Motors Corp., 889 F.2d 1078, 1081 (Fed. Cir. 1989). The Federal Circuit has made clear that District Courts should give deference to the first-filed action unless there is "sound reason that would make it unjust or inefficient to continue the first-filed action." Meru Networks, 2010 WL 3464315 *1.

As part of its inherent power to control its docket, a district court may dismiss, stay, or transfer a suit that duplicates another federal court suit. See Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) ("As between [duplicative suits pending in different] federal district courts,... the general principle is to avoid duplicative litigation."); Kerotest Mfg. Co. v. C-0 Two Fire Equip. Co., 342 U.S. 180 (1952) (same; applied to successive suits in different federal courts); Cronos Containers, Ltd. v. Amazon Lines, Ltd., 121 F. Supp. 2d 461, 465 (D. Md. 2000) ("[A]s a general rule, the forum where an action is first filed has priority over the forum where a subsequent action arising out of the same nucleus of facts is filed"). This inherent power to dismiss a duplicative lawsuit fosters judicial economy and the "comprehensive disposition of litigation." Kerotest Mfg. Co., 342 U.S. at 183. Exercise of the court's inherent power also serves to protect defendants from "the vexation of concurrent litigation over the same subject matter." Adam v. Jacobs, 950 F.2d 89, 93 (2d Cir. 1991). Thus, to protect against the possibility of inconsistent rulings and the needless squandering of judicial resources, a court faced with a duplicative suit should dismiss it without prejudice, stay it, or transfer it.

The Ninth Circuit established the threshold criteria for the "first-to-file" rule in Pacesetter. In applying the first-to-file rule, a court first looks at three threshold factors: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues. Pacesetter, 678 F.2d at 95; see, also, Meru Networks, 2010 WL 3464315 *1; L. Cohen Group v. Herman Miller, Inc., No. C

05-4476 SI, 2006 U.S. Dist. LEXIS 2301, *5-6 (N.D. Cal. Jan. 19, 2006) (granting defendant's motion to transfer venue pursuant to the first-to-file rule because "a complaint involving the same parties and issues has already been filed in another district."); Alltrade, Inc. v. Uniwield Products, Inc., 946 F.2d 622, 625-626 (9th Cir. 1991) (granting a transfer in response to defendant's motion to dismiss, stay, or transfer based on the first-to-file rule). Here, as discussed fully below, all of the factors warranting dismissal, stay or transfer based on the first-to-file rule are present; therefore, this Court should act pursuant to the rule and dismiss or stay the instant action pending the outcome of in In re Taco Bell, or transfer the case to the Eastern District.

1. In re Taco Bell Was Filed First

There is no question that the actions that comprise In re Taco Bell were filed before the instant action. As discussed in section II.B., *supra*, the Nave Class Action, which includes Duggan as a named plaintiff, was consolidated with In re Taco Bell on December 16, 2010. (See RJN, Exs. 3, 4, 5.) Duggan filed this action in the Superior Court for the County of San Francisco on September 21, 2011. (RJN, Ex. 2.) This action was then removed to this Court on December 2, 2011. (RJN, Ex. 6.)

2. The Parties Are Identical

Taco Bell Corp. and Taco Bell of America, Inc. are the defendants in both cases and Duggan is a named plaintiff in both cases.[1] Moreover, the relevant putative class definitions are substantially the same and involve overlapping claims periods. Specifically, in both actions, Duggan purports to represent all non-exempt hourly employees in California in his class claims against Defendants. (See RJN,

[1] The "identity of parties" element is also satisfied. Here, while other named Plaintiffs have joined in the In re Taco Bell action, Duggan is a named Plaintiff in that case and the instant matter. In parallel proceedings "[t]he rule is satisfied if some of the parties in one matter are also in the other matter, regardless of whether there are additional unmatched parties in one or both matters." Intersearch Worldwide, Ltd. v. Intersearch Group, Inc., 544 F. Supp. 2d 949, 959 n.3 (N.D. Cal. 2008).

Ex. 1 at ¶¶ 23(a)-(e) and Ex. 2 at ¶¶ 16-18.) The In re Taco Bell putative class includes non-exempt California employees who worked for Defendants since September 2003. (Ex. 1 at ¶¶ 23(a)-(e).) The putative class in the instant matter includes non-exempt California employees who worked for Defendants since September 2007. (RJN, Ex. 2 at ¶¶ 16-18.) Accordingly, the putative class in the instant matter is necessarily subsumed in the class proposed in In re Taco Bell. Simply put, the claims period of the two classes of "non-exempt hourly employees in California" overlap completely. Therefore, there is no question that the parties involved here substantially overlap.

3. The Actions Allege Virtually Identical Causes Of Action

The claims in both of these actions are also substantially similar. The central dispute in both matters is whether non-exempt employees were properly paid wages and reimbursed for expenses as required by California law. "The issues in the two actions need not be identical for purposes of the first-to-file rule but must only be substantially similar." See Walker v. Progressive Casualty Ins. Co., C 03656 R, 2003 U.S. Dist. LEXIS 7871, *7 (W.D. Wash. May 9, 2003). "[S]light differences in the claims asserted do not prevent application of the rule where the underlying complained of conduct is almost identical." Id. at *7-8; see, also, Sasco, 2009 U.S. Dist. LEXIS 36886 at *19 (staying case where issues were "substantially similar" as they would "require adjudication of essentially the same issues raised by this lawsuit"). The "first-filed" doctrine "is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." See Pacesetter, 678 F. 2d 95. Just as the first-to-file rule does not require the actions to have identical parties, it does not dictate that the actions raise identical claims. See Ward v. Follett Corp., 158 F.R.D. 645, 648-49 (N.D. Cal. 1994)

Here, the In re Taco Bell action and the instant action allege virtually identical causes of action on behalf of substantially similar putative classes. See

chart *supra* in section II.C. A comparison of the In re Taco Bell and Duggan Class Action complaints makes two critical points crystal clear: 1) Duggan's claims in both cases are based on allegations that Defendants failed to timely pay him and the putative class all wages due and that Defendants improperly required that he and the putative class incur costs for allegedly "required" shoes; and, 2) that Duggan's allegations in both lawsuits arise out of the same transaction or occurrence and/or nucleus of facts, specifically each pay period since September 2007, in which Defendants allegedly withheld funds owed to Duggan.

While Duggan's reimbursement and unlawful deduction claims are couched in different language, in both actions Duggan seeks the same ultimate outcome: the unpaid balance of his minimum wage compensation (including interest, costs and attorneys' fees), restitution of the funds withheld for required shoes (including interest, costs and attorneys' fees), and statutory "waiting time" penalties based on Defendants alleged failure to pay all wages due upon Duggan's termination of employment (including costs and attorneys' fees) for the same pay periods.[2] The fact that Duggan is seeking the same relief labeled as a different claim for relief does not hide the fact that the issues and parties before both district courts are the same. Courts apply the first-to-file rule where "the underlying complained-of conduct is almost identical." Dumas v. Major League Baseball Properties, 52 F. Supp. 2d 1183, 1188-89 (S.D. Cal. 1999), *vacated on other grounds*, 104 F. Supp. 2d 1220 (S.D. Cal. 2000). Here, the "underlying complained-of conduct" (whether the Defendants have properly paid their California non-exempt employees), as well as the legal standards applicable to that issue, are substantially identical between the first-filed action (In re Taco Bell) and subsequently filed case (the instant matter).

[2] The Duggan Class Action Complaint surreptitiously alleges that he was employed by Defendants as a non-exempt non-management Team Member from April 2009 to October 2010 and implies that Duggan is a former employee. (RJN, Ex. 2 at ¶24.) However, as demonstrated in detail in Defendants' concurrently filed Rule 12(b)(6) and 12(f) motion, Duggan is a current employee and, therefore, lacks standing to bring a statutory "waiting time" penalty claim based on his current employment.

The fact that different forms of relief are sought in the two lawsuits is irrelevant. If it were otherwise, litigation would only end when a party's imagination could no longer conceive of different theories of relief based upon the same factual background. See Pacesetter, 678 F. 2d 95-96. Accordingly, because all three factors of the first-to-file rule have been met, a presumption in favor of the In re Taco Bell action attaches. Therefore, this action should be dismissed, stayed, or transferred in favor of the first-filed In re Taco Bell action.

B. There Is No Reason Why To Decline To Follow The First-To-File Rule

A district court may decline to invoke the "first-to-file" rule only where "there are special circumstances which justify giving priority to the second-filed suit or a showing of a balance of circumstances favoring the second-filed suit." J. Lyons & Co. Ltd. v. Republic of Tea, Inc., 892 F. Supp. 486, 490 (S.D.N.Y. 1995). Courts have defined those "special circumstances" as "bad faith, anticipatory suit, and forum shopping." EEOC v. Univ. of Pa., 850 F.2d 969, 972 (3d Cir. 1988); *accord* Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d 599, 602 n.3 (5th Cir. 1983) (finding first suit anticipatory and designed to forum-shop); Alltrade, Inc., 946 F.2d at 628 (finding stay of identical litigation proper based on absence of equitable considerations); First City Nat'l Bank, 878 F.2d at 79 (finding no exception to first-to-file rule because plaintiff failed to show "special circumstances"). None of these factors apply in this case. Moreover, the instant action is only in the initial stages and thus has not advanced further in litigation than the In re Taco Bell action. For these reasons, In re Taco Bell is considerably ahead of the litigation posture of this action. In the absence of "special circumstances," this Court should dismiss, stay, or transfer this litigation. See Cent. States Indus. Supply, Inc. v. McCullough, 218 F. Supp. 2d 1073, 1091 (N.D. Iowa 2002) (" . . . in the absence of compelling circumstances,' the first-filed rule should apply").

C. Dismissal Is Proper In The Instant Case

The Ninth Circuit has made clear that a second-filed duplicative lawsuit may

be dismissed in the interest of comity and judicial efficiency. In Pacesetter, the Ninth Circuit affirmed the district court's dismissal of the second filed action when "[n]o apparent bar existed to a presentation of [defendant's] claims and defenses before the [first filed court]." Pacesetter, 678 F. 2d at 96. The Court determined that the "original forum was capable of efficiently resolving all issues, and economic use of both courts' resources resulted" from the second court's refusal to hear the defendant's claims. Id. See also Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980) (affirming dismissal of second-filed action where the first-filed action presented "a closely related question"); West Gulf Maritime Assoc. v. ILA Deep Sea Local 24, South Atl. and Gulf Coast District of the ILA; AFL-CIO, 751 F.2d 721, 729 (5th Cir. 1985) (dismissing an action where the issues presented can be resolved in an earlier-filed action).

As established above, the actions involve overlapping parties and factual and legal issues. Duggan could have properly asserted his claims in the In re Taco Bell action. Indeed, Duggan's claim became ripe well before he filed his first lawsuit against Defendants in November 2010. (See RJN, Ex. 2 at ¶42) (alleging an improper wage deduction on December 17, 2007). To proceed any further in this Court is a waste of the parties' and the Court's time and resources. In addition, dismissal of this case would serve the policies of the "first-to-file" rule, namely, comity and judicial efficiency. Therefore, the parties and this Court should not undertake the cost and time associated with two litigations when one will suffice. **Dismissal is the appropriate procedural cure**. However, in the alternative, this Court should stay this lawsuit pending the determination of the prior action.

D. At A Minimum, Transfer To The Eastern District Is Warranted for Reasons of Comity and Judicial Economy

In addition, for reasons of "comity and judicial economy," Defendants and this Court should not be forced to re-litigate the same issues (on behalf of the same parties) that have already been brought in the first-filed In re Taco Bell action. See

Kelmar v. Mortgage Electronic Registration Sys., Inc., 2009 WL 1298540, at *1 (N.D. Cal. 2009). For example, after years of litigation, the In re Taco Bell court has already made significant rulings regarding the same putative class and claims in the instant action. To have overlapping class action proceedings in different districts is a grossly inefficient waste of judicial resources that will result in piecemeal litigation and potentially conflicting rulings. Such wastefulness frustrates the goals of the courts to conserve scarce judicial resources and promote the efficient and comprehensive disposition of cases, which would be defeated if multiple class actions could be brought on behalf of the same putative class regarding the same alleged injury. See Peak v. Green Tree Financial Serv. Corp., 2000 WL 973685, at *2-3 (N.D. Cal. 2000) (holding that first-to-file rule applies to class actions and dismissing second-filed class action alleging "similar issues"). When the first-to-file elements are met, courts have transferred such duplicative cases to the first-filed court in order to conserve judicial resources, maximize efficiencies and ensure consistent rulings regarding substantially identical causes of action and parties. See Kelmar, 2009 WL 1298540, at *1 (transferring "substantially similar" case to the Central District pursuant to the "first-to-file rule" which is a "generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district") (citations omitted); Persepolis Enter. v. United Parcel Service, Inc., 2007 WL 2669901, at *2 (N.D. Cal. 2007)(transferring action when "all three factors" of the first-to-file rule were met).

IV. IN THE ALTERNATIVE, THIS ACTION SHOULD BE TRANSFERRED TO THE EASTERN DISTRICT PER 28 U.S.C. § 1404(A)

Federal courts have broad discretion to transfer cases between districts: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). As the United States Supreme Court explained

more than 40 years ago, the purpose of section 1404(a) "is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Van Dusen, 376 U.S. at 616 (internal citation and quotation marks omitted). Discretionary transfers under this section "should be regarded as a federal judicial housekeeping measure" directed toward satisfying the concomitant goals of judicial economy and fairness. Id. at 636.

In deciding a transfer motion, courts first consider whether the matter "might have been brought" in the district to which transfer is sought. See Metz v. U.S. Life Ins. Co. in City of N.Y., 674 F. Supp. 2d 1141, 1145 (C.D. Cal. 2009). If satisfied, courts next consider whether a transfer would advance any one of three statutory factors: (1) the convenience of the parties; (2) the convenience of witnesses; or (3) the interest of justice. Id. While section 1404(a) calls for an "individualized, case-by-case consideration" of these factors in each action, Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (*quoting* Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29 (1988)), the main factor typically to be considered is the interest of justice. See Regents of the Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559, 1565 (Fed. Cir. 1997). Indeed, "consideration of the interest of justice, which includes judicial economy, 'may be determinative to a particular transfer motion, even if the convenience of the parties and witnesses might call for a different result.'" Id.

Transfer to the Eastern District is appropriate in this case because it will serve the interest of justice. As explained, this action, which could have been brought in the Eastern District in the first place, essentially duplicates the In re Taco Bell litigation. The Eastern District already has made substantive decisions in In re Taco Bell - including denying the plaintiffs' motion for class certification for waiting time penalties (the same claim asserted in this action). To litigate this derivative action in this District makes no sense because, at minimum, the Court and the parties would have to duplicate efforts already made in In re Taco Bell and, worse, the Court would risk issuing inconsistent rulings in a substantially similar lawsuit involving

identical parties, including absent putative class members. This Court should perform "judicial housekeeping" and send this litigation to the Eastern District.

As a named plaintiff and interim class counsel in the In re Taco Bell matter, Duggan and Initiative Legal Group cannot genuinely argue that they would be "inconvenienced" by transferring this action a relatively short distance from this District to the Eastern District, especially when they are litigating the same issues in the Eastern District. Moreover, any claim of "inconvenience" would pale next to the interest of judicial economy served by transfer.

A. This Action Could Have Been Brought In The Eastern District

Whether the instant case "might have been brought" in the transferee court (the Eastern District) is a statutory prerequisite to the transfer of venue. 28 U.S.C. § 1404(a). The Supreme Court has interpreted this provision to require that the transferee court have jurisdiction over the parties and the dispute, and that venue be proper there at the time suit is filed. See Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960). Here, there is no question that the Eastern District: 1) has personal jurisdiction over the parties; 2) has subject matter jurisdiction over plaintiff's claims; and, 3) that the Eastern District is a proper venue.

Personal jurisdiction in federal court is determined as a matter of the forum state's local law. See Fed. R. Civ. P. 4(k)(1)(A). Here, both the transferor court (this District) and the transferee court (the Eastern District) are located in the same state, and the same law applies. Thus, insofar as this Court has personal jurisdiction, so too does the Eastern District. In particular, plaintiff avers that he is a resident of California and that his causes of action arise out of Defendants' contacts with plaintiff in California. Personal jurisdiction is unquestioned. See generally Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("[A] forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents.").

Subject matter jurisdiction also is proper in the Eastern District for the same

reason that it is proper before this Court: federal diversity jurisdiction, as amended by the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), extends to this suit because there is minimal diversity between the putative class and Defendants; the putative class consists of hundreds of members; and the amount in controversy exceeds $5 million dollars. (RJN, Ex. 6.)

Finally, venue is proper before the Eastern District because Defendants are a resident there for purposes of the federal venue statute. See 28 U.S.C. § 1391(a). A corporation is a resident of "any judicial district" where it would be subject to personal jurisdiction if the district were a separate state. Id. at § 1391(c). Here, it is undisputed that Defendants do business throughout California, including the Eastern District, and that Plaintiff alleges that the events giving rise to his claims occurred statewide. Because Defendants have sufficient "contacts" with the Eastern District for purposes of personal jurisdiction, venue is proper there. 28 U.S.C. § 1391(c).

B. This Action Should Be Transferred To The Eastern District

Once it has been established that litigation "might have been brought" in the transferee district, the decision to transfer venue is committed to the sound discretion of the trial court. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979) ("Weighing of the factors for and against transfer involves subtle considerations and is best left to the discretion of the trial judge."). Of "predominant importance" to this analysis, as noted above, is "[t]he question of which forum will better serve the interest of justice." Wireless Consumers Alliance v. T-Mobile USA, Inc., 2003 WL 22387598, at *4 (N.D. Cal. 2003) (*citing* Pratt v. Rowland, 769 F. Supp. 1128, 1133 (N.D. Cal. 1991)). When considering the "interest of justice," courts generally look at which forum will best serve judicial economy and efficiency, as well as which forum has a direct relationship with the parties and causes of action in the lawsuit. See Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986). In this case, both the transferor forum (this District) and the transferee forum (the Eastern District) have a direct

relationship with the parties and claims at issue, but matters of judicial economy strongly tip the scale toward transfer to the Eastern District.

1. The Eastern District Has Invested Significant Time and Resources into In re Taco Bell

This litigation has been before this Court for only a few days, but In re Taco Bell has been in the Eastern District for several years. As detailed above, in section II.B., since September 2007, the Eastern District started handling the cases that constitute In re Taco Bell, which raised substantially similar wage-and-hour claims as this action, purported to represent a substantially similar class of non-exempt employees as this action, and sought to recover the same forms of relief as sought in this action. If this duplicative action, which involves the same claims, parties, and counsel, now were to proceed in this District anew, this Court would not only risk issuing inconsistent rulings on the same claims between the same parties, but also would have to needlessly reinvent the wheel in this litigation, coming up to speed on a whole set of facts, legal issues, and discovery matters with which the Eastern District Court is already intimately familiar. Requiring this Court to expend such resources, while at the same time letting the Eastern District's time and accrued knowledge go to waste, would run counter to the very purpose of discretionary transfers under section 1404(a). See Dorado v. Laborers Pension Trust Fund for N. Cal., No. CV F 06-0394 AWI LJO, 2006 WL 2402006, at *2 (E.D. Cal. Aug. 18, 2006) ("Transfer rulings under 28 U.S.C. § 1404(a) generally turn on ... whether transfer will avoid duplicative litigation, effect judicial economy and prevent waste of time and money[.]").

This Court's decision in Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc., *supra*, is particularly instructive. In that case, a nonprofit group filed a putative class action lawsuit against T-Mobile in Alameda County Superior Court on behalf of "the general subscribing public," alleging that terms in T-Mobile's customer service agreement ("CSA") violated the California Business and Professions Code.

T-Mobile removed the action to the Northern District of California, and subsequently moved to transfer venue to the Central District. T-Mobile sought transfer to this District because, in the prior year, T-Mobile subscribers represented by the same counsel had filed an identical class action lawsuit in Orange County Superior Court, Gatton v. T-Mobile USA, Inc., alleging the same violations of the Business and Professions Code, which T-Mobile removed to the Central District. The plaintiffs in the Gatton action dismissed their claims after Judge David Carter granted T-Mobile's motion to compel arbitration.

In its motion to transfer the later-filed Wireless Consumers action to the Eastern District, T-Mobile argued that "the current action is Gatton in disguise, with the same plaintiffs and attorneys, challenging the same provisions of T-Mobile's CSA, and alleging verbatim violations of the same Business and Professions Codes," that "plaintiff double-filed its case to evade adverse rulings by the Central District and to give Gatton another chance," and that the "interest of justice" favored transfer to the Eastern District. 2003 WL 22387598, at *2. Judge Patel agreed, recognizing that "[t]ransfer is proper if a like action has been brought by the same plaintiff against the same defendant in another district, or another division of the same district." Id. at *4 (*citing* Jacobson v. Hughes Aircraft Co., 105 F.3d 1288, 1301 (9th Cir. 1997)). Judge Patel specifically found transfer appropriate in that case because Wireless Consumers and Gatton were "intimately related, if not identical;" they had "identical plaintiffs, namely all T-Mobile subscribers" and "nearly all of the claims" in Wireless Consumers "were copied verbatim from Gatton. " 2003 WL 22387598, at *5. Given this similarity, Judge Carter, the presiding judge in Gatton, was "almost guaranteed" to receive Wireless Consumers following transfer, which would "save judicial resources" and avoid "the risk of conflicting rulings on the same is-sues." Id. at *6. As this Court reasoned, "time and effort" should not be "wasted in the course of rehearing and reestablishing the facts and circumstances of this case," just to "reiterate what Judge Carter had

already stated." Id.

Numerous decisions are in accord with this Court's reasoning in Wireless Consumers. Courts consistently hold that where the transferee forum has already handled similar litigation between the same parties, transfer is appropriate. E.g., Eli Lilly & Co., 119 F.3d at 1565 (finding no abuse of discretion in transfer of venue; "[T]he interest of judicial economy may favor transfer to a court that has become familiar with the issues."); Madani v. Shell Oil Co., No. C07-04296 MJJ, 2008 WL 268986, at *2 (N.D. Cal. Jan. 30, 2008) (granting motion to transfer class action to Central District of California because that court had presided over similar class action involving same parties for "more than three years" and thus was "more familiar" with "underlying factual contentions ... common to both actions," while the Northern District "would have to invest significant time and resources to reach a similar level of familiarity"); Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F. Supp. 2d 357, 363 (W.D.N.C. 2003) (granting motion to transfer case to Western District of Oklahoma based on related litigation there; "[I]t is ... expedient to allow a court that is already familiar with [plaintiff's] essential arguments to adjudicate this case as well."); LG Elecs., Inc. v. Advance Creative Computer Corp., 131 F. Supp. 2d 804, 815 (E.D. Va. 2001) (granting motion to transfer because "very similar" actions had been adjudicated there and that court had "already invested substantial time and energy" in those "previously litigated claims").

The rationale adopted in Wireless Consumers and these similar decisions directly applies here. This putative class action (brought by the same named plaintiff and class counsel) raises substantially similar overlapping wage-and-hour claims as those brought in In re Taco Bell and purports to represent a substantially similar class of non-exempt employees. If transferred to the Eastern District, it is highly likely that this action would be re-assigned to the judge presiding over In re Taco Bell, thereby preserving the judicial resources already expended on that litigation and avoiding the risk of inconsistent rulings. On the other hand, keeping

the case in this District would force this Court to start from scratch, duplicating time and effort already invested by the Eastern District, and needlessly wasting this Court's limited resources. On those grounds, the "interest of justice" clearly supports a transfer. See Samsung Elecs. Co. v. Rambus Inc., 386 F. Supp. 2d 708, 722 (E.D. Va. 2005) ("Judicial economy and the interest of justice favor a venue which has already committed judicial resources to the contested issues and is familiar with the facts of the case.").

2. This Court Has No Greater Interest in This Litigation Than The Eastern District

In addition to judicial economy, courts reviewing a transfer motion also consider which forum has a greater interest in resolving the parties' dispute. See Decker Coal Co., 805 F.2d at 843. The "interest of justice" may favor one particular judicial district over another if that forum has a direct relationship with the parties and causes of action. Id. This analysis generally focuses on the parties' "contacts with the forum" and where the relevant events in the com-plaint took place, e.g., "where the relevant agreements were negotiated and executed." Jones, 211 F.3d at 498-99. While a particular forum's connection to the litigation may affect the "interest of justice" in some cases, it is of no consequence here. Duggan alleges that Defendants have violated wage-and-hour laws throughout the State of California, including the Eastern District, and proposes a statewide class of non-exempt employees on that basis. Neither this District nor the Eastern District has any greater interest in resolving this dispute than the other, as both have a direct relationship with the parties and claims. See, e.g., Italian Colors Rest. v. Am. Express Co., No. C 03-3719 SI, 2003 WL 22682482, at *3 (N.D. Cal. Nov. 10, 2003) (rejecting plaintiff's argument that local interest favored denying transfer of class action because "more of the relevant... agreements" were formed in the transferor forum; plaintiff "purport [ed] to act on behalf of a nationwide class of merchants," and some of those merchants entered into "identical agreements" in the

transferee forum). Accordingly, because the "relationship" factor is neutral in this case and matters of judicial economy strongly favor the Eastern District, the Court should transfer this action to that forum in the "interest of justice."

C. Transfer Will Not Prejudice or Unduly Inconvenience Duggan

Before granting a motion to transfer venue in the "interest of justice," courts generally consider whether transfer will unduly prejudice or inconvenience the opposing party. See 28 U.S.C. § 1404(a). Factors reviewed under this analysis include plaintiff's choice of forum, the difference in travel time and litigation costs, and the availability of witnesses and sources of proof in the transferee forum. See Jones, 211 F.3d at 498-99. None of these considerations tips the scale toward this District retaining this action.

1. Plaintiff's Choice of Forum Is Entitled to Little Deference

A plaintiff's choice of forum is generally given substantial weight in deciding the balance of convenience and the propriety of transfer. See Decker Coal Co., 805 F.2d at 843. However, the weight of the plaintiff's selection is not boundless. More importantly, "the Ninth Circuit, 'like other courts, has noted that the weight to be given the plaintiff's choice of forum is discounted where the action is a class action.'" Metz, 674 F. Supp. 2d at 1146 (*quoting* Saleh v. Titan Corp., 361 F. Supp. 2d 1152, 1157 (S.D. Cal. 2005)); see, also, Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir.1987) ("[W]hen an individual brings a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight.").

Here, Duggan seeks to represent a putative class of current and former non-exempt hourly employees throughout the State of California. His individual choice of forum therefore receives very little deference, and in any event, does not override the countervailing interests of judicial economy that strongly favor transfer of this action to the Eastern District. *Cf.* In re TS Tech USA Corp., 551 F.3d 1315, 1320 (Fed. Cir. 2008) (reversing denial of motion to transfer venue where trial court "erred in giving inordinate weight to the plaintiff's choice of venue").

2. Litigating in the Eastern District Will Not Unduly Burden Duggan

First, as with his choice of forum, Duggan's residence as a class representative is entitled to little deference in the transfer analysis.[3] The fact that this District is Duggan's "home forum" and therefore more convenient for him personally is immaterial. See, e.g., Georgouses v. NaTec Resources, Inc., 963 F. Supp. 728, 730 (N.D. Ill. 1997) (granting motion to transfer venue for class action lawsuit; "[B]ecause plaintiff alleges a class action, plaintiff's home forum is irrelevant."); IBJ Schroder Bank & Trust Co. v. Mellon Bank, N.A., 730 F. Supp. 1278, 1282 (S.D.N.Y. 1990) (same; "[T]he accidental residence of the named plaintiff [in a representative or class action] is discounted in weighing the transfer factors.").

Second, any inconvenience for Duggan of traveling to the Eastern District from this District would not override the otherwise prevailing factors in support of transfer. See Eli Lilly & Co., 119 F.3d at 1565. Convenience of the parties is a "subordinate" consideration where, as here, the "interest of justice" and judicial economy strongly favor transfer to another district. Wireless Consumers Alliance, 2003 WL 22387598, at *4. Indeed, Defendants are unaware of any other "cost" that Duggan would bear following transfer to the Eastern District, other than travel to the courthouse. This "inconvenience" does not outweigh the savings in judicial economy that will result from transfer. See Reese v. CNH Am. LLC, 574 F.3d 315, 320 (6th Cir. 2009) (convenience of parties and class members outweighed by interest of justice where trial judge in transferee venue was handling an identical case and therefore had a "leg up on the legal and factual issues presented"). Moreover, such inconvenience cannot really be an "inconvenience" when Duggan is already litigation in the Eastern District, and has been for some time.

Third, and perhaps most importantly, transfer of this action to the Eastern District will not prejudice Duggan's ability to "access" relevant sources of proof or "compel attendance of unwilling non-party witnesses." See Jones, 211 F.3d at 498-

[3] Duggan resides in San Francisco County (RJN, Ex. 2 at ¶7)

99. Duggan alleges statewide wage-and-hour violations and seeks to represent a putative class of current and former non-exempt Taco Bell employees throughout the State of California. Any relevant witnesses, documents or other discoverable sources of proof related to Taco Bell's statewide wage-and-hour policies and practices will be available to Duggan through discovery requests propounded on Defendants, without subpoena, just as they would be in this District.

Furthermore, to the extent Duggan may seek to compel attendance of unwilling, non-party witnesses with knowledge of his individual claims, such witnesses will be just as accessible by subpoena power following transfer to the Eastern District. For local depositions, non-party witnesses may be served with subpoenas issued by this District. See Fed. R. Civ. Proc. 45(b)(2)(A). For trial, a subpoena issued by the Eastern District will carry the same force and effect as one issued in this District. California has a state statute permitting statewide service on residents, see Cal. Civ. Proc. Code § 1989, so non-party witnesses in this District will be subject to service of trial subpoenas issued in the Eastern District. See Fed. R. Civ. Proc. 45(b)(2)(C). Accordingly, transfer is appropriate under 28 U.S.C. section 1404(a).

V. CONCLUSION

For the foregoing reasons, in the interest of judicial economy and comity, Defendants Taco Bell Corp. and Taco Bell of America, Inc. respectfully request that the present action be dismissed, or in the alternative stayed or transferred, in deference to the In re Taco Bell action in the Eastern District.

Dated: December 9, 2011 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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